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## Arbitration Nation: Wireless Service Providers and Class Action Waivers

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ARBITRATION NATION: WIRELESS SERVICES PROVIDERS  
AND CLASS ACTION WAIVERS

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ABSTRACT

*State consumer protection laws protect the public against unfair and deceptive trade practices. Plaintiffs seeking to invoke such consumer protection laws often bring class action suits to vindicate their rights. However, some jurisdictions have recently shown a willingness to enforce contract arbitration clauses that contain class action waivers. Such waivers prevent consumers from invoking class action status, and may also prevent them from enforcing relevant state consumer protection laws. Other courts, by contrast, have held that service contracts containing class action waivers violate relevant state consumer protection laws and are against public policy. Yet another group of courts facing the issue of class action waiver enforcement has held that relevant federal statutes preempt consumer claims brought under state law. This Article discusses this jurisdictional split on the issue of class action waivers and arbitration as they appear in telecommunication and wireless contracts. This Article also considers the implications of this jurisdictional divide for both businesses and wireless consumers.*

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## TABLE OF CONTENTS

Introduction .....	16
I. Anatomy of a Suit: Unfair and Deceptive Trade Practices Acts, Private Actors, and Consumer Protection .....	18
II. Federal Preemption: The Federal Arbitration Act and Federal Communications Act as Potential Defenses.....	21
A. Federal Preemption Under the Federal Communications Act.....	22
III. Arbitration Clauses and “Unconscionability”: The Central Issue.....	24
IV. Decisions Favoring the Enforcement of Arbitration Contracts Due to an Absence of “Unconscionability” .....	27
V. Where to Go from Here: Implications and Observations .....	29
Conclusion .....	31

## INTRODUCTION

Class action suits and consumer protection laws, like certain public agencies such as the Federal Trade Commission, have long defended the public from questionable business practices.<sup>1</sup> The Supreme Court has remarked that “the class action mechanism is [designed] to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action . . . [and] solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.”<sup>2</sup> While there

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<sup>1</sup> “Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.” *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 884 (Pa. Super. Ct. 2006) (citing *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 303 (1854)).

<sup>2</sup> *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Judge Posner writes, “[t]he realistic alternative to class action is not 17 million individual suits, but

remains an ongoing dialogue about the exact role of class actions within the United States,<sup>3</sup> many contract drafters have sought to limit class actions as a means to resolve contract disputes. These limitations may be accomplished in several ways, including the use of arbitration clauses that contain a class action waiver provision.

Although class action waivers are widely used, such contract language has been the subject of heightened political scrutiny in recent months.<sup>4</sup> Courts are split as to the enforceability of arbitration clauses, especially when a class action waiver is located within that specific clause. There are two bases for the jurisdictional split on the issue of arbitration class action enforcement: federal preemption and substantive state law. First, some courts have held that federal law preempts state law on the issue of arbitration; as federal law favors the enforcement of such arbitration clauses, these courts apply the terms. Other courts have concluded, however, that where there is no issue of federal preemption, the terms of the arbitration clause and its class action waiver may violate state consumer protection laws and public policy. Thus, one split is on the issue of federal preemption and the second split arises over whether a substantive violation of state law has in fact taken place.

In addressing the jurisdictional divisions in telecommunication contracts, this Article briefly discusses the origin of class action consumer protection suits. This Article then addresses the arguments put forth on the issue of federal preemption, as well as the resulting division on the issue of the arbitration clause enforcement. This Article evaluates the leading cases favoring the nullification of class

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zero individual suits, as only a lunatic or a fanatic sues for \$30 dollars.” *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

<sup>3</sup> See generally Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. CHI. LEGAL F. 71 (2003).

<sup>4</sup> See generally Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009), available at <http://www.thomas.gov/cgi-bin/query/z?c111:H.R.1020>: (proposing substantial changes to the Federal Arbitration Act); cf. Ashby Jones, *An Arbitration Revolution? AAA Joins NAF, Stops Taking New Cases*, WALL ST. J., Jul. 22, 2009, <http://blogs.wsj.com/law/2009/07/22/an-arbitration-revolution-aaa-joins-naf-stops-taking-new-cases/>.

action waivers and the conflicting cases that actually reach the substantive legal questions under state law. Finally, this Article discusses the implications of the multifaceted jurisdictional division and its impact on other similarly positioned market actors and telecommunication consumers.

#### I. ANATOMY OF A SUIT: UNFAIR AND DECEPTIVE TRADE PRACTICES ACTS, PRIVATE ACTORS, AND CONSUMER PROTECTION

Consumer protection laws protect the public from unfair and deceptive business practices in various contexts, including telecommunication agreements between consumers and service providers.<sup>5</sup> Claims against telecommunication providers often arise under state consumer protection acts (CPAs), which are also commonly referred to as unfair and deceptive trade practices acts.<sup>6</sup> Plaintiffs will often assert their CPA rights in addition to their common law contractual rights because punitive damages, statutory damages, and attorney's fees may not be available at common law. Furthermore, a CPA cause of action contains fewer requisite elements than a pure breach-of-contract cause of action.<sup>7</sup>

Plaintiffs pursuing alleged breaches of contract or CPA violations often bring class action lawsuits. Private plaintiffs must, therefore, confront class action waiver language found in their wireless service provider contracts, which may include a specific class action waiver in their contract arbitration clauses. The arbitration clause may contain terms similar to the following:

Any dispute arising out of this Agreement or relating

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<sup>5</sup> For example, the Washington state statute broadly provides the following: “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” WASH. REV. CODE § 19.86.020 (2009).

<sup>6</sup> Consumer Protection Acts are also known as “Little FTC [or Federal Trade Commission] Acts.” Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Model Rule*, 52 OHIO ST. L.J. 437, 438-39 (1991).

<sup>7</sup> *Id.* at 439-40 (explaining that the common law claims of fraud or deceit are often cumbersome in court because the claims involve as many as eight elements).

to the Services and Equipment must be settled by arbitration by the American Arbitration Association. Each party will bear the cost of preparing and prosecuting its case . . . The arbitrator has no power or authority to alter or modify these Terms and Conditions, including the foregoing Limitations of Liability section. *All claims must be arbitrated individually, and there will be no consolidation or class treatment of any claims.* This provision is subject to the United States Arbitration Act.<sup>8</sup>

In challenging such waivers, plaintiffs have broadly asserted unconscionability-style claims under their relevant state CPA. In other words, plaintiffs asserting their statutory rights often employ language that mirrors the vernacular employed to discuss general contract principles. The concept of “unconscionability,” as a term of art, bridges the statutory and common law claims and complicates analysis of the pertinent case law.<sup>9</sup>

For example, in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, the court acknowledged that although plaintiff’s challenge to the arbitration clause was “couched in terms of unconscionability, the . . . arguments relate more to broader considerations of public policy than to the harshness of a particular bargain.”<sup>10</sup> In *Scott v. Cingular Wireless*, the Washington State Supreme Court similarly observed that “the class action waiver clause . . . is an unconscionable violation of [Washington State] policy to protect the public and foster fair and honest competition” as embodied in Washington’s Consumer Protection Act.<sup>11</sup> *Nota bene* the formulation of the claims can implicate

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<sup>8</sup> *Whitney v. Alltel Comms., Inc.*, 173 S.W.3d 300, 304 (Mo. Ct. App. 2005) (emphasis added).

<sup>9</sup> See J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1757-60 (2006).

<sup>10</sup> *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 n.20 (5th Cir. 2004).

<sup>11</sup> *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (referencing RCW 19.86.920) (internal quotations omitted).

subsequent class certification proceedings and class representation.<sup>12</sup>

In addition to private causes of action, state attorneys general may also enforce their relevant CPAs.<sup>13</sup> Nevertheless, private citizens functioning as “private attorneys general” also protect the public interest—although not without controversy—when pursuing statutory and common law rights.<sup>14</sup> This rise of private protection of the public interest is due, at least in part, to limited state resources.<sup>15</sup> Although a conflict of interest between private actors and the public good can occur, even in circumstances in which a private party seeks to enforce state law,<sup>16</sup> private actors remain critical to consumer protection.

Consumers challenging the enforceability of arbitration clauses often craft claims alleging, in essence, substantive and procedural unconscionability: (1) the contract “is a contract of adhesion that [(2)] restricts” plaintiff’s means of seeking meaningful remedy, (3) because of the inclusion of a class action waiver, (4) that forces plaintiff to participate in cost prohibitive individual arbitration.<sup>17</sup> Courts that have found such a presentation of the issues persuasive have also, generally

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<sup>12</sup> Cf. *Schnall v. AT&T Wireless Servs., Inc.*, 225 P.3d 929, 934, 936-39 (Wash. 2010) (holding that the trial court properly declined certification of a nationwide class action post-*Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007), where choice of law provisions for each individual contract would require application of multiple states’ substantive law so as to overwhelm any common issues; in addition, holding that even as the Washington Consumer Protection Act governs private causes of action, the statute does not extend to protect the interests of citizens from other states).

<sup>13</sup> See, e.g., Press Release, Office of the Attorney General of Minnesota, Attorney General Swanson Sues National Arbitration Company for Deceptive Practices (July 14, 2009), [http://www.ag.state.mn.us/Consumer/PressRelease/09\\_0714NationalArbitration.asp](http://www.ag.state.mn.us/Consumer/PressRelease/09_0714NationalArbitration.asp).

<sup>14</sup> See generally *Sovern*, *supra* note 7.

<sup>15</sup> See *Scott*, 161 P.3d at 1004; see also *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 276 (Ill. 2006). But see Nina Yadava, Comment, *Can You Hear Me Now? The Courts Send a Stronger Signal Regarding Arbitration Class Action Waivers in Consumer Telecommunication Contracts*, 41 COLUM. J.L. & SOC. PROBS. 547, 574-75 (2008).

<sup>16</sup> *Sovern*, *supra* note 7, at 438.

<sup>17</sup> *Whitney v. Alltel Comms., Inc.*, 173 S.W.3d 300, 311-12 (Mo. Ct. App. 2005) (citing *Leonard v. Terminix Int’l Co.*, 84 So.2d 529 (Ala. 2002)); see also *Powertel, Inc., v. Bexley*, 743 So.2d 570 (Fla. Dist. Ct. App. 1999).

speaking, found no federal preemption of the relevant state CPA.<sup>18</sup> Nevertheless, federal preemption is a primary defense to these types of telecommunication class action waiver cases, and remains a central sub-issue for many jurisdictions; the jurisdictional split on this sub-issue will be discussed here.

## II. FEDERAL PREEMPTION: THE FEDERAL ARBITRATION ACT AND FEDERAL COMMUNICATIONS ACT AS POTENTIAL DEFENSES

Defendants responding to class action suits have claimed the Federal Arbitration Act (FAA), particularly section 2, preempts state consumer protection laws.<sup>19</sup> The Supreme Court has interpreted the final phrase of the statute to require enforcement of arbitration agreements when there remains “evidence [of] a transaction involving commerce, unless [the contract is] revocable on other grounds.”<sup>20</sup> Contract defenses “such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the section].”<sup>21</sup> In other words, an arbitration agreement under the FAA is enforceable unless other grounds—including unconscionability—provide a basis for the contract’s invalidation.

The Court provides the additional caveat regarding preemption of state law: “a court may not . . . construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that

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<sup>18</sup> See, e.g., *Scott*, 161 P.3d at 1009; see also *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) (considering arbitration and class action waiver unconscionability and violation of public policy in the context of computer sales contracts).

<sup>19</sup> Section 2 relevantly provides the following: “A written provision . . . [in] a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2006).

<sup>20</sup> *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 880 (Pa. Super. Ct. 2006) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 11-12 (1984)).

<sup>21</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).



enforcement would be unconscionable . . . .”<sup>22</sup> Stated alternatively, a state law that discriminates specifically against a contract to arbitrate violates section 2 and is likely preempted.

In light of this guidance, lower courts have held that unconscionability, as a *general* contracts principle—and not a *specific* state-law principle or defense devised for arbitration contracts alone—may provide a basis to challenge arbitration provisions.<sup>23</sup> As such, the FAA likely does not preempt state consumer protection law on the issue of class action waivers, except where state law establishes a right to pursue class actions that is statutorily impossible to waive, such as those contained in arbitration provisions.<sup>24</sup> Nevertheless, the Federal Communications Act may still preempt relevant state law on this issue.<sup>25</sup>

#### A. Federal Preemption Under the Federal Communications Act

Notwithstanding the general consensus on the unavailability of a FAA preemption defense, there remains a second and more persuasive argument for federal governance of this issue under the Federal Communications Act (FCA). The FCA, originally passed in 1934, provides one basis for a jurisdictional division on the enforceability of class action waivers contained within arbitration clauses. In its pertinent section, the FCA prohibits unreasonable discrimination and

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<sup>22</sup> *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (citing *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)) (first alteration in the original).

<sup>23</sup> *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221-22 (9th Cir. 2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 988 (9th Cir. 2007); *Scott*, 161 P.3d at 1008 (“Congress simply requires us to put arbitration clauses on the same footing as other contracts, not make them the special favorites of the law.”)

<sup>24</sup> See *Ting v. AT&T*, 319 F.3d 1126, 1150 n.15 (9th Cir. 2003) (recognizing the FAA preempts the California Legal Remedies Act (CLRA) creating a statutory right to class action). One could construe CLRA as having discriminated against arbitration contracts particularly as such contracts are often the source of class action waivers.

<sup>25</sup> One should be careful to distinguish between federal preemption of arbitration clauses under the FAA and the preemption of state-law bans on class action waivers that appear in arbitration clauses.

undue preferences among users of interstate services:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons . . . to any undue or unreasonable prejudice or disadvantage.<sup>26</sup>

The Seventh Circuit, for example, held the FCA impliedly preempts state contract law because, under the text's plain language, a converse holding would encourage price discrimination against consumers in states where arbitration provisions are not enforceable; such discrimination is prohibited under sections 201-202 of the FCA.<sup>27</sup> Nevertheless, other courts have held that no such federal preemption exists.<sup>28</sup>

For example, the Ninth Circuit has held that the Telecommunications Act of 1996, an amendment to the FCA, eliminated any preemption issues that existed under the FCA by removing tariff-filing requirements.<sup>29</sup> This detariffing released any federal preemption

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<sup>26</sup> 47 U.S.C. § 202(a) (2006).

<sup>27</sup> See, e.g., *Boomer v. AT & T Corp.*, 309 F.3d 404, 423 (7th Cir. 2002); see also *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 674 (7th Cir. 2005) (holding the same).

<sup>28</sup> See, e.g., *Ting*, 319 F.3d at 1139-43 (holding there is no implied federal preemption under the FCA); *McKee v. AT & T Corp.* 191 P.3d 845, 855 (Wash. 2008) (holding the same).

<sup>29</sup> *Ting*, 319 F.3d at 1139. Historically, "Section 203 of the Communications Act of 1934 (the 1934 Act) require[d] all common carriers to file tariffs showing all charges for the interstate and foreign wire or radio communications services they provide[d], as well as the classifications, practices, and regulations affecting such charges." Charles H. Helein, Jonathan S. Marashlian & Loubna W. Haddad, *Detariffing and the Death of the Filed Tariff Doctrine: Deregulating in the "Self" Interest*, 54 FED. COMM. L.J. 281, 287 (2008). The FCC began detariffing in the 1980s by removing the required filing processes, and continued the process until July 2001. *Id.*

concerns because federal regulation of the telecommunications industry ceased, and instead shifted to state and common law.<sup>30</sup> This shift of legal authority created another court split regarding whether class action waiver terms *actually* violate the controlling state CPA.<sup>31</sup> It is this second split that will be the focus of the next section.

### III. ARBITRATION CLAUSES AND “UNCONSCIONABILITY”: THE CENTRAL ISSUE

Numerous courts have held that class action waivers, particularly as they appear in both wireless service provider contracts and other telecommunication related contracts, are unconscionable and against public policy.<sup>32</sup> In general, courts analyzing the issue focus on two broad factors—procedural unconscionability and substantive unconscionability—which together can be considered a “totality of the circumstances” approach that requires proving both elements before a

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at 288.

<sup>30</sup> *Ting*, 319 F.3d at 1139; *McKee*, 191 P.3d at 855.

<sup>31</sup> See generally Alan S. Kaplinsky, Mark Levin & Martin C. Bryce Jr., *Arbitration Developments: The Battle Against Arbitration Intensifies*, 65 BUS. LAW. 657 (2010); see also Alan S. Kaplinsky, *A Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-dispute Consumer Arbitration Agreements*, 1591 PRAC. L. INST./CORP. 9 (2007).

<sup>32</sup> See, e.g., *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) (applying California law); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (applying Georgia law); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (holding against class action waiver enforcement for telecommunication services contract); *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (applying California law); *Bradberry v. T-Mobile USA, Inc.*, No. C 06-6567 CW, 2007 WL 1241936 (N.D. Cal. Apr. 27, 2007) (applying California law); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006); *Whitney v. Alltel Comms., Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007) (holding against class action waiver enforcement in a lending contract); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (holding against class action waiver enforcement in credit card service contract under California law), *enforced*, 36 Cal. Rptr. 3d 456 (Cal. Ct. App. 2005) (holding (1) that Delaware law was controlling, and (2) the class action waiver was enforceable under Delaware law).

provision will be struck down.<sup>33</sup> Courts may inquire into procedural unconscionability by determining whether the contract is one of adhesion.

As a general matter, an adhesion contract is negotiated by parties with vastly disparate bargaining power, and is often a “pre-printed form contract[.]”<sup>34</sup> As the *Whitney v. Alltel Communications* Court notes, however, in an age of “mass production-mass consumer society,” such form contracts are commonplace and are not procedurally unconscionable or against public policy per se.<sup>35</sup> Rather, procedural unconscionability hinges on a factual inquiry into the clarity of the contract and a determination of whether it could be easily understood by a consumer.<sup>36</sup> Adhesion contracts, due to their tendency to favor drafters, heighten the court’s awareness of potential substantive unconscionability contained in the contract terms, even where such contracts are not typographically unconscionable.<sup>37</sup>

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<sup>33</sup> See, e.g., *Whitney v. Alltel Comms., Inc.*, 173 S.W.3d 300, 309 (Mo. Ct. App. 2005); see also *Davidson v. Cingular Wireless LLC*, No. 2:06CV00133-WRW, 2007 WL 896349, at \*5 (E.D. Ark. Mar. 23, 2007) (employing a similar analysis in a case with an individual plaintiff rather than a class of similar plaintiffs). Some decisions consider only one element of unconscionability—either procedural or substantive, but not both. Compare *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 n.4 (Wash. 2007) (finding only substantive unconscionability and declining to inquire into procedural unconscionability) with *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (discussing both aspects of unconscionability).

<sup>34</sup> *Whitney*, 173 S.W.3d at 310 (citing *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. Ct. App. 2003)).

<sup>35</sup> *Id.*

<sup>36</sup> *Scott*, 161 P.3d at 1006 n.4 (recounting the factual determination of the lower court but not addressing the issue of adhesion on appeal); see also *Davidson v. Cingular Wireless LLC*, No. 2:06CV00133-WRW, 2007 WL 896349, at \*6 (E.D. Ark. Mar. 23, 2007) (considering take-it-or-leave-it clauses, font size, and location of the clauses as potential factors for consideration of procedural unconscionability in case brought by individual plaintiff).

<sup>37</sup> This may be the case despite some guidance that “[a] court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.” *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (citing *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

In contrast, courts consider substantive unconscionability by inquiring whether the costs of arbitration are sufficiently low and the availability of compensation adequately high to offer a meaningful remedy.<sup>38</sup> For example, in *Scott v. Cingular Wireless*, the Washington State Supreme Court reasoned that the class action waiver “dramatically” curbed “the public’s ability” to protect itself and was, therefore, substantively unconscionable.<sup>39</sup> Because of the cost-prohibitive nature of individual arbitration, the court held that consumers would be unable to vindicate their statutory rights available under Washington’s Consumer Protection Act.<sup>40</sup>

In addition, the *Scott* Court took further steps to address the cost-benefit concerns of the plaintiffs. The court declined to view Cingular’s contractual offer to shift the administrative costs of arbitration to the defendant as being sufficient inducement to arbitrate, due to the remaining heavy cost placed on the consumer in the form of attorney fees.<sup>41</sup> Furthermore, the *Scott* Court also shed light onto the “meaningful remedy” analysis.

The court reasoned that enforcing the terms of the contract would result in decreased likelihood of representation because “a plaintiff could recover 99 percent of a claim and still not be awarded any

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<sup>38</sup> *Whitney*, 173 S.W.3d at 311; *Scott*, 161 P.3d at 1006-07.

<sup>39</sup> *Scott*, 161 P.3d at 1003-06 (providing the relevant contract language as follows: “You agree that, by entering into this Agreement, you and Cingular are waiving the right to a trial by jury.... You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings [on] more than one person’s claims, and may not otherwise preside over any form of a representative or class proceeding, and that . . . if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.”) (original emphasis).

<sup>40</sup> *Id.* at 1005-06 (applying RCW 19.86.020 and its sister statutes).

<sup>41</sup> *Id.* at 1007-08 (observing that as the evidence was presented in the lower court, no arbitration claims had been filed by a Washington State customer against Cingular Wireless for the six years preceding this litigation). Other courts relied on by the majority lacked a factual scenario in which there was a contractual obligation imposed upon the defendant to pay the arbitration administrative fees. See, e.g., *Whitney*, 173 S.W.3d at 313-14.

attorney fees.”<sup>42</sup> More broadly, the difficulty of acquiring counsel to accept such cases with little to no possibility of financial compensation effectively insulates the contractor from damages available in a CPA claim and breach of contract claim.<sup>43</sup> While the court conceded that attorneys fees are formally available in arbitration, a class action waiver allocates the entire risk of litigation costs to the individual consumer, while offering relatively marginal gain.<sup>44</sup> As such, the class action waiver economically deters suits seeking redress for “a broad range of undefined wrongful conduct.”<sup>45</sup>

Higher courts, holding class action waivers to be unconscionable, have repeatedly stated that the substantive unconscionability of each contract is fact-specific and the holding should not be understood as a blanket voidance of all other similar contracts.<sup>46</sup> For contractors, this may indicate that courts that have held against the enforceability of class action waivers would be willing to reconsider contracts that offer greater opportunities to pursue a meaningful remedy. As yet, however, the exact terrain and language of such a contract remains unknown—drafters should be very wary.

#### IV. DECISIONS FAVORING THE ENFORCEMENT OF ARBITRATION CONTRACTS DUE TO AN ABSENCE OF “UNCONSCIONABILITY”

While there exists substantial precedent supporting the invalidation of class action waivers in telecommunication service agreements, there is also support for the enforcement of such contracts.<sup>47</sup> For

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<sup>42</sup> Scott, 161 P.3d at 1007.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1007-08.

<sup>46</sup> Compare Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1215 (9th Cir. 2008) (alleging that defendant had imposed improper charges relating to free services, additional fees beyond the advertised price, and improperly tallied plaintiffs’ roaming charges), with Riensche v. Cingular Wireless LLC, No. C06-1325Z, 2007 WL 3407137, at \*2-3 (W.D. Wash. Nov. 9, 2007) (alleging that defendants improperly transferred a “State B and O Surcharge” that was imposed by the State of Washington, directly to the consumers).

<sup>47</sup> “Generally applicable contract defenses, such as fraud, duress, or

example, in *Iberia Credit Bureau, Inc. v. Cingular Wireless*, the plaintiffs asserted claims against several telecommunications providers, including Cingular Wireless; the claims included both alleged violations of the Louisiana Unfair Practices Act as well as breach of contract. The court considered both the procedural and substantive components of unconscionability, as required under Louisiana law.<sup>48</sup>

Under the procedural element of unconscionability, the *Iberia Credit* Court considered and rejected the size of the font as a valid basis for holding that the contract was one of adhesion.<sup>49</sup> Under the substantive unconscionability prong, the court noted that “the Louisiana Unfair Trade Practices Act (LUTPA) . . . does not permit individuals to bring class actions. Although this prohibition does not apply to the plaintiffs’ breach-of-contract cause of action, it does significantly diminish the plaintiffs’ argument that prohibiting class proceedings in consumer litigation is unconscionable under Louisiana law.”<sup>50</sup> The court then elaborated on the possible availability of alternative remedies for consumers to pursue in support of their substantive analysis.<sup>51</sup> Regardless, under the Fifth Circuit’s treatment of Louisiana law, class action waivers do not render arbitration provisions unconscionable.<sup>52</sup> When considered in light of other cases

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unconscionability, may be applied to invalidate arbitration agreements without contravening,” but such agreements are otherwise enforceable. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) (citing *Doctor’s Assocs. v. Casarotta*, 517 U.S. 681, 687 (1996)).

<sup>48</sup> *Id.* at 167.

<sup>49</sup> *Id.* at 172.

<sup>50</sup> *Id.* at 174-75 (internal citations omitted); see also LA. REV. STAT. ANN. § 51:1409(A) (2008) (granting an individual the right to sue in a non-representative capacity).

<sup>51</sup> *Iberia Credit Bureau*, 379 F.3d at 177 n.19 (discussing the availability of small claims actions as a viable remedy for consumers as well as the right of the Attorney General to sue on behalf of aggrieved consumers). Nevertheless, some states prohibit counsel in small claims court. See, e.g., Arkansas Judiciary, Small Claims Court in Arkansas (2008), [courts.arkansas.gov/documents/small\\_claims\\_info.pdf](http://courts.arkansas.gov/documents/small_claims_info.pdf); see also *Davidson v. Cingular Wireless LLC*, No. 2:06CV00133-WRW, 2007 WL 896349, at \*6 (E.D. Ark. Mar. 23, 2007) (considering similar options with an individual plaintiff).

<sup>52</sup> *Iberia Credit Bureau*, 379 F.3d at 175.

on this issue, the *Iberia Credit* Court's holding and the resulting jurisdictional divide have widespread implications.

## V. WHERE TO GO FROM HERE: IMPLICATIONS AND OBSERVATIONS

As the *Vasquez* Court observed nearly 40 years ago: “[a] class action by consumers produces several salutary *by-products*, including a therapeutic effect upon those sellers who indulge in fraudulent practices, aid to legitimate business enterprises by curtailing illegitimate competition, and avoidance to the judicial process of the burden of multiple litigation involving identical claims. The benefit to the parties and the courts would, in many circumstances, be substantial.”<sup>53</sup> A jurisdictional split on the issue of class action waivers has implications for wireless service providers, other similarly situated telecommunication companies, and consumers.

First, smaller providers that have yet to deploy class action waivers in their service provider contracts are likely to be at a competitive disadvantage within the telecommunications market. In addition, the inclusion of a class action waiver in a service provider contract may still, as the case law suggests, fail to insulate the corporation from liability for certain trade practices. Given these considerations, a cost-benefit analysis for each provider would be necessary to assess the proper course of action regarding the inclusion of such a waiver. Naturally, such a waiver does not necessarily prevent arbitration.

Furthermore, favoring arbitration and enforcement of class action waivers will likely diminish overall public awareness of dubious business practices against both individual consumers and non-telecommunication businesses. As the *Scott* Court noted, “many consumers may not even realize that they have a claim” without a class action suit; moreover such consumers are not only single individuals, but often small businesses and the like.<sup>54</sup> Telecommunications

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<sup>53</sup> *Vasquez v. Super. Ct. of San Joaquin County*, 484 P.2d 964, 968-69 (Cal. 1971) (emphasis added).

<sup>54</sup> *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006-07 (Wash. 2007) (citing *Abels v. JBC Legal Group, PC*, 227 F.R.D. 541, 547 (N.D. Cal. 2005)); see also *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 163 (5th Cir. 2004)



corporations may, therefore, calculate that the likelihood of class action waiver being invalidated is sufficiently low to continue using them, notwithstanding the risk of litigation over the validity of the clauses. Or still more troublesome, such corporations may calculate that the damages resulting from a losing suit are still sufficiently low so as to justify the use of class action waivers against customers in other arbitration-enforcing jurisdictions.<sup>55</sup> Consumers should be on the lookout.

In addition, courts that inquire into the business practices of the wireless service providers will likely affect both public and private actors in the future. The *Iberia Credit* Court noted that telecommunication provider contracts might also include a confidentiality clause within their arbitration clauses.<sup>56</sup> Indeed, confidentiality clauses can limit the parties from disclosing the results of arbitration. Furthermore, arbitration “depriv[es] plaintiffs of the ability to establish precedent.”<sup>57</sup> The result will likely be that consumers in the future, especially in particular jurisdictions where arbitrations are still widely practiced, will be less able to know and invoke their available rights under state consumer protection laws.

Finally, the implications of widespread denial of class actions may require state attorneys general, or state legislatures, to take a more active role in this area of the law to prevent continued use of questionable practices by telecommunications companies. On the

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(enforcing a contract in which neither party “may disclose the existence, content or results of any arbitration . . .”).

<sup>55</sup> The ethical questions raised by advising a client to retain an unconscionable provision in a jurisdiction that, for example, claims to follow a case-by-case approach to contract arbitration issues, remain beyond the scope of this Article.

<sup>56</sup> *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004).

<sup>57</sup> *Id.* But see, e.g., *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 445 (S.D.N.Y. 1995) (finding against the enforceability of a confidentiality agreements with regards to a discrimination claim, but not trade secret claims; also observing that “[w]here conduct of a party tends to preclude availability of information relevant to a litigation and where no genuine basis for keeping that information confidential exists, a court or factfinder may infer that the information, if disclosed, would be contrary to the position of the party engaging in such conduct.” (citing *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976))).

other hand, even where states have invalidated class action waivers, additional considerations still arise, including: nationwide class actions and the extraterritorial extension of state statutes to protect foreign citizens from the acts of telecommunication companies operating or incorporated in the forum jurisdiction.<sup>58</sup> Regardless, state attorneys general should take a more active enforcement role to combat the unfair trade practices altogether.<sup>59</sup>

### CONCLUSION

The continued appearance of class action waivers in the arbitration clauses of telecommunication contracts may deter individual consumers from exercising their legal rights. Indeed, only exceedingly provoked consumers would believe it possible to recoup such a paltry sum after reading their arbitration clauses.<sup>60</sup> Nevertheless, rulings such

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<sup>58</sup> See, e.g., *Schnall v. AT&T Wireless Servs., Inc.*, 225 P.3d 929, 936-39 (Wash. 2010) (Madsen, C.J.) (holding, as was noted, that the trial court properly declined certification of a nationwide class action where choice of law provisions for each individual contract would require application of multiple states' substantive law so as to overwhelm any common issues; in addition, holding that even as the Washington consumer protection act governs private causes of action, the statute does not extend to protect the interests of the citizens from other states) (internal citations and quotations omitted).

<sup>59</sup> In states such as Washington, as the dissent in *Scott* pointed out, state legislatures could, and arguably should, be the legal body to address the consistency problem of class action waivers in arbitration clauses and other derivative issues such as nationwide class action suits and class arbitration. *Scott*, 161 P.3d at 1010-11 (Madsen, J., dissenting) (comparing the California legislature's explicit addressing of the issue of class action waivers compared to the majority's policy rationales). It should be noted, however, that the issue of federal preemption looms large over the state legislature's authority to address the issue. See Donald M. Falk & Archis A. Parasharami, *Federal Court Rejects Class Action Waivers in Arbitration Clauses*, 14 WASH. LEGAL FOUND. 8 (2006), available at <http://www.wlf.org/upload/100606falk.pdf> (highlighting the risks of compelled class arbitration as a result of cases in this area of the law).

<sup>60</sup> See, e.g., *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); see also *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 885 (Pa. Super. Ct. 2006). This, of course, presumes that the consumer reads the arbitration provision in the first instance or is aware of the extent to which such a provision reduces the likelihood of

as *Scott v. Cingular Wireless* should put individual wireless consumers, including small business owners and other non-traditional consumers, on notice that: (1) clauses within their service provider contracts may be void as per public policy; (2) a public record has been developed on such issues that has not been sealed by an arbitrator; (3) the terms of such contracts may change to circumnavigate such jurisdictions and states via the use of choice of law provisions; and (4) class arbitration may be on the way. Moving forward, consumers and advocates alike will need to be both sensitive to a sharp divide in the treatment of arbitration provisions and class action waivers, and strategic when pursuing potential claims—class action or otherwise—against telecommunication providers.

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successfully litigating a dispute.